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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 583

CECIL B. SANNER AND MARY W. SANNER,
Petitioners,

v.

THE TRUSTEES OF THE SHEPPARD AND ENOCH PRATT HOSPITAL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Table of Citations

Cases

	PAGE
Ferguson v. Skrupa, 372 U.S. 726 (1963)	7
Fournier v. Miriam Hospital, 93 R.I. 299, 175 A. 2d 298 (1961)	2
Glona v. American Guarantee & Liability Insurance Co., 88 S. Ct. 1515 (1968)	7
Howard v. Bishop Byrne Council Home, 249 Md. 233, 238 A. 2d 863 (1968)	4-5
Levy v. Louisiana, 88 S. Ct. 1509 (1968)	7
Loeffler v. Sheppard-Pratt Hospital, 130 Md. 265, 100 A. 301 (1917)	7
Makar v. St. Nicholas Church, 78 N.J. Super. 1, 187 A. 2d 353 (1963)	2
Missouri v. Lewis, 101 U.S. 22 (1880)	6-7
Neely v. St. Francis Hospital & School of Nursing, 192 Kan. 716, 391 P. 2d 155 (1964)	3
Nicholson v. Good Samaritan Hospital, 199 So. 344 (Fla. 1940)	4
Noel v. Menninger Foundation, 175 Kan. 751, 267 P. 2d 934 (1954)	3
Perry v. House of Refuge, 63 Md. 20 (1885)	7
Weeks v. Children's Hospital of Philadelphia, 200 F. Supp. 77 (E.D. Pa. 1961)	2-3

Constitution and Statutes

United States Constitution, 14th Amendment	2, 3, 7
Annotated Code of Maryland (1957 ed.):	
Article 43, Section 556A	6
Article 48A, Section 480	5

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Petitioners' argument that the state of the law as to charitable immunity is so "chaotic generally" among the several States (particularly with reference to constitutional implications) that this Court should grant the petition and impose one uniform and standard rule for all fifty states is without merit and misconceives the present state of the charitable immunity doctrine.

First, it is not true, as Petitioners would have this Court believe, that the state and federal courts are in hopeless conflict over the federal constitutional implications of charitable immunity. On the contrary, every court which has

ruled on the question has held that the doctrine of charitable immunity does not violate the equal protection or due process clauses of the 14th Amendment. See, *Weeks v. Children's Hospital of Philadelphia*, 200 F. Supp. 77 (E.D. Pa. 1961); *Makar v. St. Nicholas Church*, 78 N.J. Super. 1, 187 A. 2d 353 (1963); *Fournier v. Miriam Hospital*, 93 R.I. 299, 175 A. 2d 298 (1961). In *Fournier*, the court stated:

> "The plaintiff's contention that art. XIV, §1, of amendments to the federal constitution renders the immunity statute invalid is likewise without merit. Her argument is that the statute is a denial of due process and constitutes discrimination in violation of the equal privilege and protection clauses. This court in *In the Matter of Nichols, supra*, 8 R.I. at page 54, observed that, 'Although, in a free government, every man is entitled to an adequate legal remedy for every injury done to him, yet the form and extent of it is necessarily subject to the legislative power * * *.'
>
> "Nor is an act of the legislature adopted pursuant to its power to declare public policy in violation of art. XIV of the amendments, if the act in question is neither capricious nor arbitrary in the sense that it does not discriminate between persons, groups or corporations, falling within the same classification." 175 A. 2d at 301.

And in *Weeks*, the district court said:

> "In order to be violative of the equal protection clause of the Fourteenth Amendment, a state law must be shown to be without any reasonable basis and to be purely arbitrary. *Morey v. Doud*, 354 U.S. 457, 463, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957). The burden of showing the essential arbitrary nature of said law is on the party assailing the classification. *Morey v. Doud*, *supra*.
>
> "Plaintiff has not sustained her burden of proving that Pennsylvania has denied her due process of law and the equal protection of its laws because its courts

exempt charitable institutions from the doctrine of respondeat superior in tort cases such as the instant one.

"Even if a state law discriminates in favor of a certain class, the law is not arbitrary and violative of the equal protection clause if the discrimination is grounded on a reasonable distinction. *Tax Commissioners v. Jackson,* 283 U.S. 527, 51 S. Ct. 540, 75 L. Ed. 1248 (1931). The Supreme Court has found laws based on various distinctions constitutional. Cf. *Helvering v. Bliss,* 293 U.S. 144, 149-151, 55 S. Ct. 17, 79 L. Ed. 246 (1934).

"This court can find no reason to declare this Pennsylvania rule so arbitrary as to be a violation of due process of law. The law, although classifying charitable institutions differently from other institutions, is founded on a reasonable basis. Charities are separately classified for tax purposes in Pennsylvania, as well as other states, and the Federal Government has passed tax laws containing preferential treatment for them. The same rationale which supports the above classifications supports the distinction under Pennsylvania law in the rule now before the court.

"The state has the power to provide for the health of its citizens. Non-profit hospitals which are supported in large measure by state funds bear a close relationship with this power. The health of the state's citizens might properly be considered in possible jeopardy if these charitable hospitals were made liable under the doctrine of respondeat superior for tort injuries caused by their servants." 200 F. Supp. at 79.

The three cases on which Petitioners rely to show the asserted conflict deal not with the federal constitution but with a state constitution. In both *Noel v. Menninger Foundation,* 175 Kan. 751, 267 P. 2d 934 (1954), and in *Neely v. St. Francis Hospital & School of Nursing,* 192 Kan. 716, 391 P. 2d 155 (1964), the Kansas court, in striking down the charitable immunity doctrine, relied on Section

18 of the Bill of Rights of the Kansas Constitution. Neither case contained any discussion of the federal constitution.

In *Nicholson v. Good Samaritan Hospital,* 199 So. 344 (Fla. 1940) the court cited a provision of the Florida Constitution but only in support of its statement that courts should determine or fix public policy as reflected by the existing constitution and laws; and, accordingly, the court should not (in a case of first impression) recognize the doctrine of charitable immunity on the ground that such immunity would benefit public policy.

The diversity cited and complained of by Petitioners (Petition, pp. 12-14) is simply healthy diversity among the states on a matter of state law, and which exists because of our federal system of laws and government. This diversity has recently been documented in *Howard v. Bishop Byrne Council Home,* 249 Md. 233, 238 A. 2d 863 (1968) where the Maryland Court of Appeals noted:

> "Eight states agree with Maryland that, as a matter of public policy, eleemosynary institutions should be immune from liability to tort claimants, either on the theory that the charitable assets are placed in trust for charitable purposes, or that the doctrine of *respondeat superior* does not apply to religious or charitable organizations. Two of these states, Missouri and South Carolina, have even gone so far as to rule that a charitable corporation may set up its immunity even though it carries liability insurance.
>
> "At the other end of the spectrum are the twenty states and the District of Columbia which have in effect totally abandoned charitable immunity, and now hold all such institutions amenable to suit, and their property subject to attachment.
>
> "Most jurisdictions, however, are reluctant to totally withdraw immunity, and, therefore, they set up important distinctions. As a consequence, we discover that in most states, liability will depend on the type

of negligence, the function of the charitable institution at the time of the injury, the presence of liability insurance or any combination of these factors." 249 Md. at 237-38, 238 A. 2d at 865-66.

The Maryland Court of Appeals concluded:

"By reading the cases cited, plus numerous earlier decisions, the inescapable conclusion is reached that both imposition and abrogation of the immunity doctrine are products of specific circumstances. There is no universal sentiment charging charitable tort immunity to be unconscionable, a state subsidy to religious organizations or a deprivation of equal protection of the laws. Where states have chopped away at the doctrine, it has mostly been by processes of attrition and piecemeal adjudication, often accompanied by legislation amending the state insurance code." 249 Md. at 241, 238 A. 2d at 867.

The General Assembly of Maryland has kept the charitable immunity doctrine under close scrutiny for many years, periodically reviewing its wisdom and social utility. As stated in *Howard*, in 1947 it declined to enact a proposed bill which would have estopped any charitable institution from pleading immunity as a defense to a tort claim. Instead, it adopted a bill which estopped a liability insurer from setting up the charitable immunity of the insured. This has become Article 48A, §480 (Chapter 900, Acts of 1947), Annotated Code of Maryland (1957 Ed.), which reads:

"Each policy issued to cover the liability of any charitable institution for negligence or any other tort shall contain a provision to the effect that the insurer shall be estopped from asserting, as a defense to any claim covered by said policy, that such institution is immune from liability on the ground that it is a charitable institution."

In 1966, the General Assembly again modified the doctrine of charitable immunity by enacting Article 43, §556A (Chapter 673, Acts of 1966), Annotated Code of Maryland (1957 Ed.):

> "No hospital or related institution as defined in this subtitle shall be immune from liability for negligence or any other tort on the grounds that it is a charitable institution; provided, however, that a hospital or related institution which is a charitable institution and which is insured against such liability in an amount not less than $100,000 shall not be liable for damages in excess of the limits of such insurance."

Section 2 of Chapter 673 of the Acts of 1966 of the General Assembly of Maryland provides that "nothing in this act shall apply to claims for acts of negligence or other torts occurring before June 1, 1966."

Article 48A, §480 is not strictly applicable to this case because it is undisputed that Respondent did not carry liability insurance at the time that the Petitioners' alleged cause of action arose. This section is relevant here only to indicate that the General Assembly of Maryland has considered the question of charitable immunity and has approved the decisions of the Court of Appeals of Maryland, adding only that a charitable institution would be liable to the extent of any liability insurance carried by it. Hence, Petitioners' arguments that Article 48A, §480 is unconstitutional are not properly before this Court.

Hence, it can be seen that the question of charitable immunity, whether a state should adopt it and if so, to what extent, does not reach constitutional proportions. Rather, it remains a question for which each state provides its own answer. As this Court said in *Missouri v. Lewis*, 101 U.S. 22, 31 (1880):

> "The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line."

And see *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), where Mr. Justice Black, in the majority opinion, said:

> "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. * * * Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.'"

Second, Petitioners have claimed (Petition, p. 11) that the charitable immunity doctrine has declared them "non-persons", in opposition to the rationale of *Levy v. Louisiana*, 88 S. Ct. 1509 (1968), and *Glona v. American Guarantee & Liability Insurance Co.*, 88 S. Ct. 1515 (1968).

Petitioners did, however, clearly have a right to sue the individual employees of Respondent involved in the allegedly negligent care of the Petitioner, Mary Sanner. *Perry v. House of Refuge*, 63 Md. 20 (1885); *Loeffler v. Sheppard-Pratt Hospital*, 130 Md. 265, 272, 100 A. 301, 303 (1917). Petitioners have elected not to file suit against such persons; thus, they have elected to forego their undisputable right and remedy against the individuals involved in favor of pursuing the Respondent against whom, at the time of the occurrence complained of, they had no right or remedy.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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